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1 THE COURT: Okay. We'll be in session. Would
2 counsel make their appearances.

3 MR. WELK: For Appellant, US West Communications,
4 Thomas J. Welk of Sioux Falls.

5 MR. MAXFIELD: And, your Honor, Peter C. Maxfield of
6 Laramie, Wyoming.

7 MR. McELROY: Scott McElroy, representing Cheyenne
8 River Sioux Tribal Telephone Authority.

9 MR. LONG: Your Honor, Larry Long, Attorney General's
10 Office for the PUC.

11 MR. HOSECK: Cameron Hoseck on behalf of the PUC.

12 MR. ABERLE: Steven Aberle on behalf of Intervenor,
13 Doug Scott.

14 MR. FERGEL: Andrew Fergel on behalf of McIntosh City
15 Council and Corson County Commission.

16 THE COURT: Okay. Well, I'm familiar with the file,
17 obviously, counsel.

18 Mr. Welk, you may -- are you going to argue?

19 MR. WELK: Yes, your Honor. The Appellant has three
20 lawyers and we have talked about how to divide this up so
21 we would not be repetitive. Mr. McElroy will argue the
22 issue relative to the application of the statute in
23 question, that is 49-31-59, and the equal protection
24 argument. Mr. Maxfield will argue the issue about whether
25 the Commission's decision on remand violated this Court's

1 order of remand and Wold Engineering. And I will talk
2 very briefly only on the issue of relief as it relates to
3 what the Appellant requests.

4 That is how we have proposed to divide the argument,
5 your Honor.

6 THE COURT: So who wants to go first?

7 MR. WELK: Mr. McElroy will go first.

8 THE COURT: How about for the Commission and
9 Intervenors?

10 MR. LONG: Your Honor, Mr. Hoseck and I will, with
11 the Court's permission, both speak on behalf of the PUC.
12 I will attempt to address those issues which relate to
13 Indian law questions and Mr. Hoseck will address
14 everything else.

15 THE COURT: Do Intervenors wish to argue?

16 MR. ABERLE: We would reserve the right to argue very
17 briefly on issues that they do not raise.

18 THE COURT: Okay. Mr. McElroy.

19 MR. McELROY: Thank you, your Honor.

20 I want to address first, our principal contention
21 that the Commission misread and misapplied Section
22 49-31-59. We believe that the sale of the exchanges from
23 US West to the Telephone Authority meets the standard set
24 forth in that standard and that the sale should have been
25 approved. US West and the Telephone Authority find

1 themselves in a difficult predicament in this situation.
2 And in your earlier ruling, you ruled that the Commission
3 did have jurisdiction over these sales, both for the
4 Morristown and McIntosh sales, which are exchanges which
5 are off of the Cheyenne River Reservation and on Standing
6 Rock Reservation.

7 THE COURT: I didn't explicitly rule, I simply
8 restated one of the Supreme Court cases that says
9 off-reservation activities are subject to different rules.
10 Did I specifically -- I don't recall specifically ruling
11 that the Commission would exercise regulatory jurisdiction
12 over these -- over these exchanges after the sale. At
13 most, all I dealt with was jurisdiction of the sale,
14 number one; and number two, I don't recall dealing at all
15 with the question of regulation after the sale.

16 MR. McELROY: I think you're correct, your Honor.
17 And I may have misstated that just a moment ago when I was
18 reciting your opinion. And I believe that in your initial
19 ruling you did rule that the Commission had authority over
20 the sales and that the fact that the Cheyenne River Sioux
21 Tribe and the Telephone Authority had certain
22 characteristics under federal law, was not sufficient to
23 preempt state law -- or Commission's jurisdiction over the
24 sales themselves either for the off-reservation exchanges
25 or on on-reservation exchanges of the -- or portion of the

1 exchange at Timber Lake.

2 What we now find is that those very same
3 characteristics that we argued previously were sufficient
4 to preempt Commission jurisdiction, turn around now and
5 put us in a predicament where these same characteristics
6 ultimately have been used by the Commission to deny the
7 sales themselves. We think that result is not required by
8 either the terms of the state statute properly applied, or
9 in the, assuming for sake of argument, that the Commission
10 properly applied the state statute, that they have a --
11 that there is an equal protection barrier to what they
12 have done. As Mr. Maxfield will argue, there's a problem
13 relative to Wold Engineering and that decision.

14 Now, Senate Bill 49-31-59 is a fairly straight
15 forward statute. It establishes five factors by which to
16 judge these sales. Those factors relate to the quality of
17 service, the payment of taxes, and the cost of local
18 telephone service after the sale.

19 What I think is significant about the state statute
20 is some of the things that it does not do. It does not on
21 the face of it make any one factor decisive. It does not
22 say that Commission jurisdiction after the sales must be
23 identical to Commission jurisdiction before the sales.
24 And it does not say that the consumer of those exchanges
25 must be in the same position after the sales as it was

1 before the sales. It instead sets up a list of these
2 various factors which need to be met for the sale to
3 qualify.

4 Now, in our case, there is no dispute over the
5 ability of the Telephone Authority or indeed willingness
6 of the Telephone Authority to provide the same level of
7 service which US West now provides. That's what the
8 Findings say, and that is not disputed by the Commission
9 as we are here today.

10 What happened is in its decision for all three
11 exchanges, is that the Commission refused to approve the
12 sales, one, because of the payment of taxes issues; and
13 two, what it said in its -- in the three decisions was its
14 ability to condition the sales. What it says in its brief
15 is its ability to effectively condition the sales, both of
16 which I would submit relate to the issue of sovereign
17 immunity which the Telephone Authority has.

18 Let me turn first to the concern over the payment of
19 taxes. From our perspective, Mescalero Apache Tribe v.
20 Jones is controlling as to those portions of the three
21 exchanges, which is all of McIntosh, all of Morristown and
22 a portion of Timber Lake, with regards to the payment of
23 taxes. Mescalero Apache Tribe v. Jones permitted the
24 State of New Mexico to apply its non-discriminatory gross
25 receipts tax to a tribal ski enterprise that was located

1 off of the Mescalero Apache Reservation on U.S. Forest
2 Service land and concluded that those taxes could be
3 applied to the off-reservation commercial activities of an
4 Indian tribe. Based on your treatment of the issues
5 relative to the Standing Rock Reservation earlier, we
6 don't see that there's any meaningful distinction that can
7 be drawn between the situation in Mescalero and the
8 situation here for those portions of the three exchanges
9 that are located off of the Cheyenne River Sioux
10 Reservation. The State tax applies.

11 THE COURT: Are you conceding that the Tribe would be
12 liable for the tax?

13 MR. McELROY: I'm conceding, your Honor, that under
14 your original opinion --

15 THE COURT: No, that's not what I asked. What I'm
16 asking is are you conceding that the Tribe would be liable
17 for the gross receipts tax on those portions of the
18 exchanges not on the Cheyenne River Reservation?

19 MR. McELROY: What I was saying, your Honor, if I can
20 just give one explanation before I answer your question
21 directly. You -- we argued originally that PUC
22 jurisdiction was preempted on Standing Rock Reservation.
23 My understanding of your earlier ruling was you did not
24 accept that particular argument. So our position here is
25 if that is true -- and we've appealed that earlier ruling

1 to the Supreme Court -- our position here is that if that
2 is correct, that the PUC has jurisdiction, it is not
3 preempted by virtue -- jurisdiction over these sales. It
4 is not preempted by any of the regulatory activities that
5 has taken place by Standing Rock Sioux Tribe or by federal
6 law, then that area should be treated the same as any
7 other off-reservation area.

8 But our concession, if you will, in that regard is
9 premised on your original ruling that the issues relative
10 to the Standing Rock Sioux Tribe are not sufficient to
11 preempt jurisdiction.

12 THE COURT: Well, you know, you can't have it both
13 ways. Either there's -- they're liable for the tax or
14 they're not. And it seems to me -- I don't know if this
15 is judicial estoppel, whether that technically applies or
16 whatever, but it concerns me that you are -- you've
17 candidly told me that you're appealing my decision on
18 jurisdiction, but now you're arguing that they are subject
19 to the tax. And I don't know how you can argue the
20 Commission erred this time because they are liable for the
21 tax, but yet argue -- or inform me that you're appealing
22 the decision saying that they're not liable -- they would
23 not be liable for the tax. I mean, how can you take both
24 of those positions in this same case?

25 MR. McELROY: We're taking both of those positions

1 because of the circumstances that we find ourselves in
2 relative to the posture of this particular case. I mean,
3 we --

4 THE COURT: But, let me interrupt. Then your bottom
5 line still is -- your belief still is that the -- that the
6 Authority would not be subject to the tax. I mean, that's
7 your ultimate belief, is it not? I mean, that's what
8 you're appealing to the Supreme Court.

9 MR. McELROY: That is what we are appealing to the
10 Supreme Court. You put me in a bit of a predicament at
11 this stage because without knowing how the sale -- what
12 the terms are for the approval of the sale, I can't really
13 make the sort of concession that you're asking.

14 At the original hearing, Mr. Williams, the manager of
15 the Telephone Authority, did say that the Tribe would pay
16 gross receipts taxes. And so I mean, the record is that
17 the Tribe is willing to pay the gross receipts tax. I am
18 reluctant to make the concession that I believe you're
19 asking, which is an absolute confession of liability for
20 the taxes, given the fact that we don't know what the
21 final approval of the sales looks like. I don't want to
22 be perceived as undermining our appeal.

23 My view is I think that Mescalero v. Jones provides
24 strong support for the position by this state that it
25 would -- that the Telephone Authority would be liable for

1 those gross receipts taxes for the off-reservation -- for
2 off-reservation portions -- and by off-reservation, I mean
3 off Cheyenne River Sioux Reservation. I am reluctant to
4 concede our argument about preemption relative to Standing
5 Rock without -- without knowing what the full picture
6 looks like. And it seems to -- as I understand your
7 question, that's what you're -- what you are asking me.

8 THE COURT: Well, it's just that I -- you know, I
9 don't know how you can have it both ways is all I'm --
10 what I'm trying to get to. You know, you're arguing both
11 sides of the legal issue at this same time and using both
12 premises to argue that the Commission erred.

13 MR. McELROY: Today, your Honor, we're only arguing
14 one position. We have accepted for purposes of the
15 remand -- we've accepted for purposes of the current
16 appeal to you, the correctness of your prior ruling and we
17 have proceeded on those grounds. That is what we told the
18 Commission that you said in particular, that they had
19 authority over the sales and that they could impose
20 conditions on those sales.

21 And so I mean, the predicament that we find ourselves
22 in is we have -- we do have alternative arguments.
23 There's no question about it. Assuming for the sake of
24 argument that you were right, that Standing Rock and the
25 federal government, that their status did not preempt

1 on-reservation, we have said, well, if that's the case,
2 then there is jurisdiction to impose those taxes by the
3 PUC. And I don't see how we can operate at this stage any
4 way other than under your prior ruling.

5 THE COURT: Okay. Well, what about the argument that
6 was raised by Mr. Long? I did not see it responded to in
7 your Reply Brief about -- and I forget the name of the
8 case off the top of my head, but it's the one where the
9 Supreme Court talks about the incidence of the tax and
10 where the incidence falls, if it falls on tribal
11 enterprise, then there's -- then Indian law would prohibit
12 that type of thing, but if it's on -- this case would be
13 the subscriber rather than on the enterprise, there are
14 jurisdiction distinctions that should be drawn there.

15 MR. McELROY: That distinction only relates, in our
16 view, to that portion of the Timber Lake exchange that is
17 on the Cheyenne River Reservation.

18 THE COURT: How do you respond to the argument --

19 MR. McELROY: That --

20 THE COURT: -- that this is a tax that would -- it
21 applies to -- the gross receipts tax would be an incidence
22 of the tax would be on the Tribal Authority rather than on
23 the telephone subscriber?

24 MR. McELROY: But Mescalero v. Jones addresses that
25 for the portions off of the Cheyenne River Sioux Tribe.

1 THE COURT: What about the portion on the --

2 MR. McELROY: The portion on the reservation we have
3 two responses. One is whatever difficulty might exist
4 with regards to that particular factor, and it could be
5 more difficult, I believe, than the areas off the
6 reservation, that's not ordinarily a factor in the
7 statute, the payment of taxes. And so what we're talking
8 about is a small part of the Timber Lake exchange, a
9 portion of the Timber Lake exchange.

10 Secondly, the problem as defined by the State say
11 that is a problem of state law. They don't have a state
12 tax that applies to non-Indian citizens purchasing
13 services from someone such as the Telephone Authority. So
14 again, they've put us in this difficult position. They
15 passed the state statute making payment of taxes an issue
16 for consideration by the Commission and yet they've -- yet
17 they've crafted a state -- the state tax statute so that
18 it would not apply to this particular transaction. If the
19 State wanted to put incidence of the tax on the non-Indian
20 purchasers of services from the Telephone Authority, the
21 cases say that even on the reservation, they may impose
22 that tax. So what they have done is again, put us between
23 the rock and the hard spot of saying payment of taxes is
24 an issue, but oh, by the way, our state tax law doesn't
25 work to collect taxes on these particular transactions so

1 therefore, you Telephone Authority, can't proceed with the
2 purchase of these exchanges.

3 So again, it's a problem that the State could fix
4 because cases like Oklahoma Tax Commission do say that
5 they can tax the non-Indian's who are purchasing the
6 services, and yet they haven't set up a state tax system
7 to do that.

8 So I think our principal contention is that that's
9 only one factor. It's only a part of the Timber Lake
10 exchange, but we also say that that is a problem that's of
11 the State's own making and they need -- they have some
12 responsibility for fixing the problem. They put us into
13 that predicament.

14 THE COURT: Well, the fact that the statutes
15 involving taxes which apply throughout the state happen to
16 put you in a predicament, is that a legal basis to grant
17 authority or to grant, I guess, the relief that you're
18 asking for here? I mean, are you really saying that this
19 is like any other business that's having trouble getting
20 through a mass of tax and regulatory matters? You can't
21 say just because the tax code and everything else is a
22 bizarre mess -- which I'm not saying is true in this
23 case -- but because there are a few road blocks and
24 impediments already existing because of unique tax laws,
25 that certainly doesn't give you the right to relief for

1 you to say, well, State, you got to go out and fix these
2 things to take care of this.

3 MR. McELROY: I think the situation is different
4 than -- far different, your Honor, than the usual
5 situation involving a business because when you get to the
6 bottom of each of those factors that the Commission used
7 to deny the sales, whether it's payment of taxes, whether
8 it's their ability to enforce the conditions which they
9 impose on the sale, those difficulties arise only because
10 much -- at least as the Commission has applied the
11 statute, only because of those particular characteristics
12 that the Telephone Authority has as an entity of the
13 Cheyenne River Sioux Tribe.

14 But what we see with the payment of the taxes
15 question, for example, is if you apply Mescalero Apache
16 Tribe v. Jones to say that the Tribe is liable for those
17 gross receipts tax, the only difficulty that -- and the
18 Commission never denies that that decision would control
19 in this particular situation, the only difficulty the
20 Commission had was the problem that the Tribe has
21 sovereign immunity and it's worried about how to collect
22 those taxes. But that's traceable directly back to the
23 characteristics that the Telephone Authority has as an
24 entity that's part of and parcel of the Cheyenne River
25 Sioux Tribe. So it has those characteristics under

1 federal law.

2 That same situation is what exists with regards to
3 the Timber Lake setting. The difficulty with taxing the
4 Telephone Authority is because it is a part of the
5 Cheyenne River Sioux Tribe. I mean, the way that the
6 Commission has read this statute, no tribe can pass muster
7 under the statute unless it's prepared to either waive it
8 -- to waive its sovereign immunity and perhaps to
9 relinquish some of its sovereign immunity.

10 My job today is to try to explain to you why I think
11 that's an improper reading of the statute because the
12 Commission is left with a lot more authority than it's
13 willing to acknowledge. I don't usually come into court
14 and trot out Mescalero Apache Tribe v. Jones or
15 Oklahoma Tax Commission. I mean, part of the reason
16 I'm stumbling when you ask me about these things a little
17 bit is those are decisions that recognize a substantial
18 amount of authority in states relative to tribes, but they
19 only go so far.

20 And so what I see is that yes, there's an issue with
21 regards to tax on the Timber Lake portion of the exchange.
22 If your earlier decision was correct that there's no
23 preemption of state jurisdiction with regards to the
24 portions on the Standing Rock exchange, then Mescalero
25 Apache Tribe controls the payment of taxes is paid. If

-- and all we're left with is the concern of the Commission relative to how sovereign immunity plays into that. But again, that is something that's not shared in by any other business within the state. It's a particular issue for the tribes. It has -- under the Commission's reading of this statute, it means that no tribe can ever purchase a telephone authority -- a telephone exchange under their reading of the statute. I don't think that's what the statute says.

THE COURT: But the Tribe could -- or any tribal group could enter into agreements with the PUC or with whoever that would satisfy these concerns and still not give up sovereign immunity it would seem to me. I mean, a tax -- you pointed out in your briefs that they've entered into tax collection agreements with the State. I mean, it seems to me that something like that would resolve the issue here and had the Tribe done that --

MR. McELROY: I think it is true if there were an agreement in place it would resolve the issues. The problem at this stage is the Commission has raised a question -- the Commission says it doesn't have authority to enter into the tax agreement. I have no reason to challenge that. It also says that even the Department of Revenue under state law doesn't have authority to enter into such agreement.

1 THE COURT: Well, look, we got agreements --
2 everybody agrees that there are agreements out there that
3 are working. Somehow they do this.

4 MR. McELROY: I understand, your Honor. I think if
5 what you are saying, if your condition -- is that if a
6 condition for approval of this sale is there has to be an
7 agreement in place, that agreement, to be candid, will
8 never be negotiated. If the sale is approached, then
9 there will be an agreement. The Tribe has said it's
10 willing to do that.

11 THE COURT: Why is that?

12 MR. McELROY: Because I believe we've been in front
13 of the Commission twice to try to get approval of these
14 sales and in each case they've turned it down. I think
15 that if you give a veto power to either side, then we're
16 not going to have an agreement. And as long as the
17 agreement can be held up as a barrier complete -- or lack
18 of an agreement can be held up as an barrier to approval
19 of the sale, we are not going to have a sale take place
20 because the agreement takes two to tango and we've said we
21 are willing to do it.

22 You know, we've had agreements elsewhere. The
23 Telephone Authority is willing to go forward with that.
24 Have we -- have we consummated it, no, but there's no
25 incentive frankly, on the other side to consummate such an

1 agreement as long as it stands as a barrier to the sale.

2 THE COURT: Well, then it would be inaccurate to say
3 that Commission interpretation would bar any other tribal
4 government from doing this because if there was an
5 agreement they certainly -- it seems to me they've
6 overcome the obstacle presented here.

7 MR. McELROY: Only -- what the Commission has said
8 under the statute is -- I'm not sure what agreement one
9 would reach. I mean, you have an agreement on taxes,
10 presumably. But what the Commission has said is that the
11 other conditions cannot be satisfied as long as sovereign
12 immunity exists for the Tribe. And I don't think you can
13 condition the approval on the waiver of sovereign
14 immunity.

15 But what they have said -- what I understood your
16 earlier decision to say was they could put conditions on
17 the sale. They have jurisdiction over the sale,
18 therefore, they have jurisdiction to put conditions on the
19 sale. Their concern is over enforcing those conditions
20 and they dodge or avoid saying it directly, but what they
21 are really saying in everything that they put forward is
22 that sovereign immunity is what precludes their
23 enforcement of those conditions.

24 And I think that if I take your earlier order of
25 remand and the Wold Engineering II case that it is

1 pretty clear that you cannot condition approval on the
2 waiver of sovereign immunity. And so from our
3 perspective, if you take the statute as they have applied
4 it, a tribe that has sovereign immunity has a certain
5 amount of regulatory authority on its own reservation,
6 they have said that you can -- that the sale of such an
7 exchange cannot -- to that tribe cannot be approved but
8 only because of characteristics which the tribe enjoys
9 under federal law. And that -- that is not what the
10 statute says.

11 What the statute says is the Commission is to look at
12 the quality of service. We have no dispute over that.
13 They're to look at payment of taxes. We've talked about
14 ways in which the State can collect those taxes. We
15 talked at our -- in our brief at great length about the
16 ways that are available to the Commission or the State to
17 collect those taxes if you're enforcing its conditions, if
18 in fact there was some disagreement over that down the
19 road, which there is no indication of in the record. So
20 what we think is if you take all the factors on -- in the
21 statute, you -- the sale would meet those factors taken as
22 a whole.

23 THE COURT: You just mentioned again the alternatives
24 for collection of the taxes. And you've previously talked
25 about the Oklahoma Tax Commission case. What -- under

1 the facts of this case, what specific alternatives would
2 be available to the State?

3 MR. McELROY: There is an off-set available against
4 the Tribe.

5 THE COURT: Against the individual.

6 MR. McELROY: Against the individual. The State used
7 that very successfully in South Dakota v. Bourland as we
8 pointed out in our brief. The Tribe was not a party.
9 They sued the chairman of the Tribe. They resolved the
10 issue over -- of State -- of tribal jurisdiction over the
11 taking area associated with the Oahe Reservoir without the
12 Tribe being a party, without the United States being a
13 party. I got the Supreme Court to rule on that particular
14 question. So that's one.

15 Two, I suspect, although I'm not an expert in
16 telephone -- the telephone business, that there are
17 self-help ways such as the ETC designation and other ways
18 in which they could interject themselves into the Tribe's
19 relationship with telephone providers off of the
20 reservation to assure compliance. They could have an
21 agreement with us, which we talked about, and of course
22 they could always change the jurisdictional allocation of
23 authority through federal legislation.

24 Let me move very quickly to equal protection unless
25 you have more questions about this. The equal protection

1 question is a difficult question. The -- but it cries out
2 for being addressed in light of the disparity of what has
3 happened here. What we've seen is 67 exchanges were sold.
4 63 of those were approved. The three that were not --
5 that were subject -- that involved the Tribe were not
6 approved. It is our contention and certainly we recognize
7 that we talked about this the last time we were here, your
8 Honor, but it is our contention that this particular
9 matter should be judged by the strict scrutiny standard.
10 That is --

11 THE COURT: That Arizona case, I mean the language is
12 in there, but I don't see any analysis or any -- I mean,
13 it looks like that judge to me threw that language in
14 there as an aside. Unless I missed it. I only read the
15 page that you cited me to.

16 MR. McELROY: No, you're correct, your Honor. She
17 did not -- she did not go through an analysis. But I
18 think that if --

19 THE COURT: We did that the last time, you and I in
20 court.

21 MR. McELROY: As I recall, you asked me about Wold
22 Engineering and whether that provided support, and I
23 agree it does not provide support.

24 I think that you really have to start from step one
25 to analyze whether or not strict scrutiny is the

1 appropriate standard. The U.S. Supreme Court in the
2 Washington v. Yakima case talks about whether strict
3 scrutiny should apply and goes to the fact that tribes and
4 federal -- and federal government have a particularly
5 unique standard that allows the United States to treat
6 tribes differently than others because of that political
7 relationship. That does not apply to states.

8 So what we wind up with with tribes is -- there's
9 clearly a racial component to tribal entity. Yes, it also
10 has a political component, but it also has a racial
11 component. I think that if you look at the standards for
12 strict scrutiny that talk about political powerlessness,
13 the need for protection from the majoritarian political
14 process, the issues that were discussed in Plyler v. Doe
15 and cited again by Judge Porter in the Gambling Gulch or
16 Gaming Gulch case that he decided a few years ago, as
17 well as the fact that the position in which the tribes
18 find themselves is one that's beyond their control. They
19 have those characteristics as a result of federal law. We
20 think that that does justify a strict scrutiny analysis.

21 I think you also have to look at the question of the
22 impact of this and I think there's no question but that if
23 you look at how the statute has been applied it's
24 disproportionate impact, adverse impact is on the tribes.

25 The second question is whether or not you can assign

1 any discriminatory intent. And the way we look at that is
2 if you take the statute as applied by the Commission,
3 which is to say that these characteristics that only
4 tribes have of sovereign immunity and sovereignty can be
5 used under the statute to preclude a tribal purchase of a
6 telephone exchange, then because you have to assume that
7 the Legislature knew the law and knew what it was doing,
8 you have to assign a discriminatory intent to it.

9 As I said earlier, I don't think that's the right
10 reading of the state statute, but if that is the correct
11 reading, that you can bring in these particular factors to
12 preclude purchase of the exchange by the tribes, you have
13 to assume that the Legislature knew that because it's very
14 -- those characteristics are very well set out in the law
15 and they're well known. And so you get a discriminatory
16 intent by virtue of the result.

17 Secondly, let me say that as we look at the statute,
18 even if the test is not strict scrutiny, but instead
19 rational basis, that the actions by the Commission don't
20 meet that standard as we have tried to lay out in our
21 briefs, thus allowing the sales to go forward under the
22 statute would meet all of the reasonable concerns of the
23 State.

24 The only concern that -- again, the only -- and so
25 that it is irrational to say that you can preclude any

1 purchase of the sales by virtue of the characteristics
2 enjoyed by the Tribe. That is of sovereign immunity and
3 sovereignty which is what has happened in this particular
4 instance. And there's no rational basis for the State to
5 want to do that.

6 Unless you have questions, your Honor, I think I've
7 taken more than enough of my time.

8 THE COURT: All right. Mr. Maxfield.

9 MR. MAXFIELD: Thank you, your Honor.

10 My part of this argument, as Mr. Welk said, is simply
11 issue 3. Issue 3, whether or not the Commission in its
12 August of '97 Amended Order and Decision violated the
13 federal laws set out in Three Affiliated Tribes v. Wold
14 Engineering Number 2, and whether the Commission in its
15 Amended Order violated the order of remand of this Court
16 by implicitly conditioning approval for the three sales on
17 a substantial waiver by the Cheyenne River Sioux Tribe and
18 its Telephone Authority of the tribal sovereignty and
19 self-government of the Tribe.

20 The first time this case was before this Court, the
21 facts were the Commission had concluded in its, I think
22 July of '95 Order and Decision that because, among other
23 things, the Cheyenne River Sioux Tribe and Telephone
24 Authority had not waived their sovereign immunity, that
25 the Commission would not grant approval for the sale.

1 This time around, the syntax of the order has changed
2 some, but the substance is identical. And this is evident
3 through the -- all three of the orders, the amended orders
4 but it's also evident in the Commission's discussion of
5 issues 1 through 3 in its brief.

6 And the best example of this is in Finding Number
7 25 -- Finding of Fact Number 25 in the Amended Order and
8 that's the finding where the Commission concludes that the
9 same would not be in the public interest because there
10 are, I think, eight items specified there that are -- that
11 exist that are negatives. And first, as I recall -- I've
12 got them in front of me here, but I don't want to read
13 them -- is their no enforcement mechanism to collect taxes
14 from the Tribe. Number two, no regulatory control so that
15 conditions of sale can be enforced. I think three is no
16 ability to enforce -- to require, excuse me, that the
17 Tribe provide the same services that US West has been
18 providing. Four, no ability to require that the Tribe
19 provide or honor the contracts or commitments that US West
20 has previously entered into. And items 6, 7, and 8 deal
21 with different items, but it's inability of the
22 Commission, as it states it, to require, to regulate its
23 lack of control.

24 The negative inference to be drawn from that is if
25 those -- if that power, that enforcement mechanism were